

RESOLUTION NO. 74579

A Resolution of the City Council of the City of San José approving a Conditional Use Permit and Determination of Public Convenience or Necessity to use certain real property described herein for the purpose of the off-sale of alcoholic beverages in an existing commercial use on a 1.33 gross acres site located on the southeast corner of South Second and East San Fernando Streets (100 South Second Street).

FILE NO. CP08-056 & ABC08-007

WHEREAS, pursuant to the provisions of Chapter 20.100 of Title 20 of the San José on June 18, 2008, an application (File No. **CP08-056 & ABC08-007**) was filed for a Conditional Use Permit and Determination of Public Convenience or Necessity to allow the sale of alcoholic beverages in an existing commercial use for off-site consumption, on that certain real property (hereinafter referred to as "subject property"), situate in the DC Downtown Primary Commercial Zoning District, located on the southeast corner of South Second and East San Fernando Streets, San José, and

WHEREAS, the subject property is all that real property described in Exhibit "A," which is attached hereto and made a part hereof by this reference as if fully set forth herein; and

WHEREAS, on August 6, 2008, the Planning Commission denied the application, from which decision the property owner has appealed to this City Council; and

WEREAS, pursuant to and in accordance with Chapter 20.100 of Title 20 of the San José Municipal Code, this City Council conducted a hearing on said application on April 8, 2008, notice of which was duly given; and

WHEREAS, at said hearing, this City Council gave all persons full opportunity to be heard and to present evidence and testimony respecting said matter; and

WHEREAS, at said hearing this City Council received and considered the reports and recommendation of the Director of Planning, Building and Code Enforcement; and

WHEREAS, at said hearing, this City Council received in evidence a development plan for the subject property entitled "CUP Submittal," dated July 2, 2008, which plan is on file in the Department of Planning, Building and Code Enforcement and

is available for inspection by anyone interested therein, and said development plan is incorporated herein by this reference, the same as if it were fully set forth herein; and

WHEREAS, said hearing was conducted in all respects as required by the San José Municipal Code and the rules of this City Council.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF SAN JOSÉ:

After considering evidence presented at the Public Hearing, the City Council finds that the following are the relevant facts regarding this proposed project:

1. The subject site is located on the southeast corner of South Second and East San Fernando Streets (100 South Second Street).
2. The subject site is located within Downtown Primary Commercial Zoning District.
3. This site has a designation of Core Area on the adopted San José 2020 General Plan Land Use/Transportation Diagram.
4. Under the provisions of Section 15332, Infill Development Projects, of the State Guidelines for Implementation of the California Environmental Quality Act (CEQA) as stated below, this project is found to be exempt from the environmental review requirements of Title 21 of the San José Municipal Code, implementing the California Environmental Quality Act of 1970, as amended. This project qualifies in that the project is consistent with the applicable General Plan designation and zoning district, the project site is surrounded by urban uses, the project site has no value as habitat for threatened species, approval of the project would not result in any significant effects to traffic, noise, air quality, or water quality, and the site can be adequately served by all required public services.
5. The subject proposed grocery store will have a gross floor area of 23,620 square feet of gross floor area and a net floor area of 18,213 square feet and is part of a larger mixed-use development, known as The 88.
6. The existing grocery store proposes to occupy no more than six percent of the floor area to the sales of alcoholic beverages.
7. The project site is located in a census tract with an existing over-concentration of liquor licenses, and there are four other off-sale establishments within 1000' of the subject site.
8. The site is located in an area with a high number of calls for police service or a high crime rate.
9. Due to over-concentration of crime and liquor licenses as noted above, the project is subject to the requirements for a Determination of Public Convenience or Necessity for a liquor license for the off-sale of alcoholic beverages. The granting of such a determination requires that four specific findings be made as prescribed by Title 6 of the San José Municipal Code.

10. The proposed use is not within a Strong Neighborhood Initiative area or other area designated by the city for targeted neighborhood enhancement services or programs.
11. The project site is located within 500 feet of a university (San José State University) to the east.
12. The project site is located adjacent to and within 150 feet of residentially zoned property, as the DC Downtown Primary Commercial Zoning District allows residential uses by right.
13. The above mentioned residential uses are located directly above the proposed use, as well as to the north, northeast, and east of the site. Additional residential uses are proposed to the south of the site, as part of the second phase of high-rise development.
14. Negative impacts to the nearby school, library and residences are not anticipated because the alcohol sales are only a small part of a larger retail use and are incidental to the full-service grocery store.
15. The Police Department has indicated that they are not opposed to the issue of off-sale of alcohol in conjunction with a full-service grocery store proposed at this location.
16. The proposed use does not include late night operation. The retail sale of alcoholic beverages is to be in conjunction with the retail sales of a full range of groceries.
17. On August 6, 2008, the Planning Commission held a public hearing to consider the proposed Conditional Use Permit and Determination of Public Convenience or Necessity (File Nos. CP08-056 and ABC08-007). The Director of Planning recommended denial of the Conditional Use Permit and request for a Determination of Public Convenience or Necessity because two of the required four findings for the Determination of Public Convenience and Necessity could not be made.
18. On August 7, 2008, the applicant appealed the Planning Commission decision to deny the subject proposal (see attached Notice of Appeal and letter from Seth Bland, representative of Wilson Meany Sullivan). The Permit Appeal requests that the City Council find that the proposed off-sale of alcohol as an ancillary use in a full-service grocery store would provide an overriding public benefits and that the Council make a Determination of Public Convenience or Necessity to allow the issuance of the ABC licenses required to operate the proposed business insofar as the proposed sales of alcoholic beverages functions only in conjunction with a full-service grocery store.
19. Upon an appeal, Title 6 allows the City Council to make a Determination of Public Convenience or Necessity for a proposal that does not meet all of the required factual findings, if the Council makes a finding of significant and overriding public benefit.
20. The proposed off-sale of alcoholic beverages is incidental and appurtenant to a larger retail use and provides for a more complete and convenient shopping experience. For the 18,213 square feet of net sales floor area, only approximately 6% is to be dedicated to the sale of alcoholic beverages, which is incidental to the overall grocery store use.

A condition has been added limits the relative percentage of net floor area dedicated to the sale of alcoholic beverages to 8% to allow for minimal flexibility in floor area usage and opportunities for promotional events in the future store. A limit of 8% still ensures that the off-sale of alcohol remains an incidental component to the existing retail use, and that the required findings could still be made.

21. The proposed outlet for the off-sale of alcoholic beverages would facilitate the location of a new full-service grocery store in Downtown San José, contributing to the investment and redevelopment of the area.

Based on the above stated facts, the City Council concludes and finds:

1. Based on the findings in the subsection below, the City Council hereby makes a Determination of Public Convenience and Necessity for the subject liquor license:
 - a. The proposed use is not located within a Strong Neighborhoods Initiative or Neighborhood Revitalization area or other area designated by the city for targeted neighborhood enhancement services or programs. Per their memo, "the Police Department is not opposed to a full-service grocery store at 88 E. San Fernando Street with an ABC off-sale retail license to sell alcohol as currently proposed by the Planning Department." Despite its location within a high-crime area, the Police have not indicated that the use, as proposed, would be detrimental to the public health, safety, or welfare of persons in the area, nor have they indicated that the use would increase the severity of existing law enforcement or public nuisance problems; and
 - b. The proposed use would lead to the grouping of more than four off-sale uses within a one thousand-foot radius from the proposed use; and
 - c. The proposed use would be located within five hundred feet of a school, day care center, public park, social services agency, or residential care or service facility. The proposed use is within one hundred fifty feet of an existing residence and is therefore not in conformance with the requirements of Title 6 of the SJMC.
 - d. Alcohol sales would not represent a majority of the proposed use.
 - e. Significant and overriding public benefits will be served by the proposed use, as noted in Items 20 and 21 in the Facts section above.
 - f. The proposed off-sale of alcoholic beverages is incidental and appurtenant to a larger retail use and provides for a more complete and convenient shopping experience.
 - g. The proposed off-sale of alcoholic beverages would enhance or facilitate the vitality of an existing commercial area without presenting a significant impact on public health or safety.
2. The City Council concludes and finds, based on the analysis of the above facts in regard to the Conditional Use Permit, that:

- a. For this use located closer than five hundred (500) feet from any other use involving the off-sale of alcoholic beverages, situate either within or outside the City, the proposed location of the off-sale of alcoholic beverages use would result in a total of more than four (4) establishments that provide alcoholic beverages for off-site consumption within a one-thousand (1,000) foot radius from the proposed location. The resulting excess concentration of such uses would not:
 - i. Adversely affect the peace, health, safety, morals, or welfare of persons residing or working in the surrounding area; or
 - ii. Impair the utility or value of property of other persons located in the vicinity of the area; or
 - iii. Be detrimental to public health, safety or general welfare.
- b. The use is closer than one hundred fifty (150) feet from residentially used and zoned property and is closer than five hundred feet (500) to a university; however, the building in which the proposed use is to be located is situated and oriented in such a manner that would not adversely affect such residential use.

In accordance with the findings set forth above, a Conditional Use Permit to use the subject property for said purpose specified above and subject to each and all of the conditions hereinafter set forth are hereby granted. Further, in accordance with the findings set forth above, the City Council makes a Determination of Public Convenience or Necessity in conjunction with the proposed off-sale of alcoholic beverages. This City Council expressly declares that it would not have granted this permit except upon and subject to each and all of said conditions, each and all of which conditions shall run with the land and be binding upon the owner and all subsequent owners of the subject property, and all persons who use the subject property for the use conditionally permitted hereby.

CONDITIONS

1. **Acceptance of Permit.** Per Section 20.100.290(B), should the applicant fail to file a timely and valid appeal of this Permit within the applicable appeal period, such inaction by the applicant shall be deemed to constitute all of the following on behalf of the applicant:
 - a. Acceptance of the Permit by the applicant; and
 - b. Agreement by the applicant to be bound by, to comply with, and to do all things required of or by the applicant pursuant to all of the terms, provisions, and conditions of this permit or other approval and the provisions of Title 20 applicable to such Permit.
2. **Recordation.** This Conditional Use Permit shall have no force or effect and the subject property shall not be used for the hereby permitted uses unless and until this Resolution has been recorded with the County Recorder.

3. **Permit Expiration.** This Conditional Use Permit shall automatically expire two years from and after the date of adoption of the Resolution by the City Council, granting this Permit, if within such two-year period, the proposed use of this site has not commenced, pursuant to and in accordance with the provisions of this Conditional Use Permit. The date of adoption is the date the Resolution granting this Conditional Use Permit is approved by the City Council. However, the Director of Planning may approve a Permit Adjustment to extend the validity of this Permit in accordance with Title 20 of the SJMC. The Permit Adjustment must be approved prior to the expiration of this Permit.
4. **Building Permit/Certificate of Occupancy.** Procurement of a Building Permit and/or Certificate of Occupancy from the Building Official for the tenant space described or contemplated to be built under this permit shall be deemed acceptance of all conditions specified in this permit and the applicant's agreement to fully comply with all of said conditions. No change in the character of occupancy or change to a different group of occupancies as described by the "Building Code" shall be made without first obtaining a Certificate of Occupancy from the Building Official, as required under San José Municipal Code Section 24.02.610, and any such change in occupancy must comply with all other applicable local and state laws.
5. **Off-Sale of Alcoholic Beverages.** This permit allows for the sale of alcoholic beverages, beer wine and distilled spirits, for off-site consumption in a retail store.
6. **Grocery Store Use.** The sale of alcohol shall be allowed in conjunction with a full-service grocery store use only.
7. **ABC Permit.** Obtainment and maintenance of an ABC License is evidence of acceptance of all conditions specified in this document and the applicant's intent to fully comply with said conditions. The permittee shall at all times be and remain in compliance with the ABC licensing and shall cause any occupants of the subject site to be and remain in compliance with the ABC licensing.
8. **Conformance to Plans.** The use development shall conform to approved plans entitled, "CUP Submittal," dated July 2, 2008, on file with the Department of Planning, Building and Code Enforcement and to the San José Building Code (San José Municipal Code, Title 17, Chapter 17.04).
9. **Compliance with Local and State Laws.** The subject use shall be conducted in full compliance with all local and state laws. No part of this approval shall be construed to permit a violation of any part of the San José Municipal Code. The Permit shall be subject to revocation if the subject use is conducted in such a manner as to cause a nuisance.
10. **Compliance with Approved Permits.** The developer shall comply with all terms and conditions of the previously approved permits on the site.
11. **Hours of Operation.** Operation between the hours of 12:00 midnight and 6:00 a.m. is not authorized by this permit. Operation between these hours requires approval in accordance with Title 20 of the SJMC.

12. **Operations Plan.** Loitering is prohibited on or around the premises or the area under the control of the applicant licensee(s). No alcoholic beverages shall be consumed on any property adjacent to the premises over which the project developer/applicant has control. The project developer/applicant shall be responsible for maintaining free of litter the area adjacent to the premises over which they have control.
13. **No New Construction.** No new construction is allowed under this permit.
14. **Floor Area.** The maximum floor area devoted to the sale of alcohol shall be 8% of the net floor area of the tenant space, in conformance with the net area specifications in the approved plans.
15. **Shopping Cart Management.** A shopping cart management program shall be adopted to ensure that shopping carts do not end up in residential neighborhoods. The plan may either ensure that carts cannot be removed from the property or can be quickly tracked and retrieved if they are removed from the property.
16. **Nuisance.** This use shall be operated in a manner that does not create a public or private nuisance. Any such nuisance must be abated immediately upon notice by the City.
17. **Signs.** No new signs are approved with this Permit at this time. Any and all proposed new signage must first be reviewed and permitted under and pursuant to a separate Sign Permit and then maintained thereafter in accordance with the terms and conditions of that applicable Sign Permit.
18. **Anti-Graffiti.** The applicant shall remove all graffiti from buildings and wall surfaces within 48 hours of defacement.
19. **Revocation, Suspension, Modification.** This Conditional Use Permit may be revoked, suspended or modified by the Planning Commission, or by the City Council on appeal, at any time regardless of who is the owner of the subject property or who has the right to possession thereof or who is using the same at such time, whenever, after a noticed hearing in accordance with Part 3, Chapter 20.44, Title 20 of the San José Municipal Code it finds:
 - a. A violation of any conditions of the Conditional Use Permit was not abated, corrected or rectified within the time specified on the notice of violation; or
 - b. A violation of any City ordinance or State law was not abated, corrected or rectified within the time specified on the notice of violation; or
 - c. The use as presently conducted creates a nuisance.

In accordance with the findings set forth above, a Conditional Use permit to use the subject property for said purpose specified above is hereby **approved** and a Determination of Public Convenience or Necessity **is** made.

ADOPTED this 9th day of September 2008, by the following vote:

AYES: CHIRCO, CHU, CORTESE, LICCARDO, NGUYEN,
OLIVERIO, PYLE, WILLIAMS; REED.

NOES: NONE.

ABSENT: CAMPOS, CONSTANT.

DISQUALIFIED: NONE.

VACANT: NONE.

CHUCK REED
Mayor

ATTEST:

LEE PRICE, MMC
City Clerk